No. 76-363

In the Supreme Court of the United States

OCTOBER TERM, 1976

AMBHU ASSOCIATES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 538 F. 2d 312. The decision and order of the National Labor Relations Board are reported at 218 NLRB 831 (Pet. App. 3a-25a).

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1976. (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations

Act by coercively interrogating, threatening, and discharging an employee because of his union membership and activities.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158(a)), provides, in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

The relevant facts are set forth in detail in the opinion of the Board's Administrative Law Judge (Pet. App. 5a-25a) which was adopted by the Board (Pet. App. 2a), and in the Appendix to the briefs in the court of appeals. In brief, the Administrative Law Judge found the following:

Petitioner Amshu Associates, Inc., is engaged in the construction and operation of apartment developments (Pet. App. 6a-7a). In September 1973 petitioner hired Thomas Hopkins as resident superintendent for Sleepy Hollow Gardens, an apartment development in Spring Valley, New York. Hopkins was hired on the understanding that he and his wife would live in an apartment in the development and would be on call for tenant complaints at all times except his weekly day off. Hopkins and his wife moved into the apartment

shortly after he was hired, and lived there until his discharge in July 1974. (Pet. App. 8a-9a.) In December 1973 and May 1974 Hopkins received raises in pay (Pet. App. 13a; A. 248).[1]

In June 1974 Hopkins complained to petitioner's vice-president, Mark Weidman, that he needed additional help to do his job properly. Weidman responded that petitioner could not afford it. This response induced Hopkins to revive his membership in the Building Service Employees International Union, Local 32E (the "Union") on June 24, 1974. On the same day, the Union sent petitioner a letter demanding recognition at Sleepy Hollow Gardens. (Pet. App. 11a.)

The following day Weidman and the Union attended a representation hearing involving Spring Valley Gardens, an apartment development owned by Spring Valley Associates.[2] At this hearing the Union representative, Kenneth Childers, suggested to Weidman that, since a certification petition had also been filed for Sleepy Hollow Gardens, the two proceedings be held together. When Childers informed Weidman that Hopkins had joined the Union, Weidman responded that he intended to discharge

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[1] "A." refers to the Appendix to the Briefs in the Court of Appeals.

[2] Weidman is also a partner in Spring Valley Associates and executes the labor policy for both Spring Valley Associates and petitioner. Spring Valley Associates and petitioner share the same office and personnel and are owned largely by the same people. On these facts the Board found that petitioner and Spring Valley Associates constitute a single employer within the meaning of Section 2(6) and (7) of the Act. See *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256.

Hopkins, allegedly because Hopkins had not taken up residence at the development. Childers warned Weidman not to discharge Hopkins. (*Ibid.*)

Several days later Weidman saw Hopkins and said, "I see you joined the [goddamned] union," to which Hopkins assented. Weidman then replied that Hopkins would not be "around here very long." When Hopkins stated that he could not be fired for his union activities, Weidman replied, "Well, we will find some way to get rid of you." (Pet. App. 12a.) On July 8, 1974, petitioner sent Hopkins a letter stating that he was being discharged, allegedly because it had "become apparent that you have no intention of residing in the building" (Pet. App. 17a).

Much of the foregoing was disputed by petitioner at the hearing before the Administrative Law Judge. In particular petitioner claimed that Hopkins was discharged because he and his wife had not taken up permanent residence in the development, that tenants had been complaining that Hopkins was frequently unavailable, and that petitioner had begun seeking a replacement for Hopkins months before he joined the Union. Weidman also denied the remarks to Hopkins in late June.

The disputed issues of fact and conflicting testimony were considered by the Administrative Law Judge and resolved against petitioner. The Administrative Law Judge credited the testimony of Hopkins, his wife and other witnesses that Hopkins and his wife took up residence at the apartment shortly after Hopkins was hired. He found that the instances of Hopkins' unavailability occurred primarily on his days off, and noted that, notwithstanding petitioner's alleged dissatisfaction on this score, Hopkins was given a wage raise in May 1974. On the basis of the testimony of the persons allegedly interviewed to replace Hopkins, the Administrative Law

Judge found that petitioner had not established that it had been seeking a replacement for Hopkins before Hopkins joined the Union. He also credited Hopkins' testimony concerning Weidman's remarks to Hopkins. The Administrative Law Judge concluded that petitioner had violated Section 8(a)(1) and (3) by coercively interrogating, threatening, and discharging Hopkins on account of his union activities, and recommended that petitioner be ordered to cease and desist from these unfair labor practices, to offer to reinstate Hopkins with back pay, and to mail the customary notices. The Board adopted the Administrative Law Judge's findings and ordered the recommended relief, and the court of appeals enforced that order.[3]

ARGUMENT

Petitioner's contention that the Board's finding of unfair labor practices is not supported by substantial evidence is without merit. Petitioner does not dispute that testimony of witnesses and other evidence of record

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[3]With respect to a separate complaint, consolidated with the foregoing proceeding, the Administrative Law Judge also found that Spring Valley Associates had coercively interrogated employee Carr in violation of Section 8(a)(1) and that by virtue of their common operations and personnel Spring Valley Associates and petitioner constitute a single employer within the meaning of Section 2(6) and (7) of the Act. On the Administrative Law Judge's recommendation, however, the Board declined to issue any remedial order with respect to this single incident. Petitioner therefore is not aggrieved by, and hence is without standing to challenge the determinations concerning this incident. 29 U.S.C. 160(f); *International Union, United Automibile, Aerospace & Agricultural Implement Workers of American* v. *Scofield*, 382 U.S. 205, 210; *Deaton Truck Line, Inc.* v. *National Labor Relations Board*, 337 F. 2d 697 (C.A. 5), certiorari denied *sub nom. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903. In any event, those determinations are amply supported by the record (Pet. App. 3a, 6a-8a, 12a).

controverted its own denials of coercive and threatening interrogation and the evidence supposedly supporting its alleged reasons for discharging Hopkins. Rather, petitioner claims, in essence, that its evidence and witnesses should have been credited and the contrary evidence and testimony discounted.

It is well established that credibility resolutions are matters for the trier of fact and the Board, and should not be upset in the absence of extraordinary circumstances. See, *e.g.*, *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404; *National Labor Relations Board* v. *Security National Life Insurance Co.*, 494 F. 2d 336 (C.A. 1); *National Labor Relations Board* v. *A & S Electronic Die Corp.*, 423 F. 2d 218 (C.A. 2), certiorari denied, 400 U.S. 833. No such circumstances are present here. The Administrative Law Judge carefully considered all of the conflicting evidence, and his resolution of the credibility issues and his conclusions from the evidence are amply supported by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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